

In the Court of Appeals of the State of Alaska

Matthew Foy,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13019**

Order

Petition For Rehearing

Date of Order: **7/8/2022**

Trial Court Case No. **2NO-16-00324CR**

Before: Allard, Chief Judge and Wollenberg and Harbison, Judges.

The State seeks rehearing of our decision in *Foy v. State*, ___ P.3d ___, Op. No. 2725, 2022 WL 2091938 (Alaska App. June 10, 2022). The State contends that the Court overlooked or misconceived a proposition of law in evaluating Foy's sufficiency challenge to his first-degree assault conviction. We find no merit to this contention. The State also contends that this Court's discussion of the moot vindictive prosecution claim created an unfair inference of vindictive prosecution. Because that was not the intent of the Court and because the discussion is largely unnecessary as the claim is moot, this Court will amend that portion of the opinion.

Accordingly, IT IS ORDERED:

1. The petition for rehearing is GRANTED IN PART:
2. The last paragraph on page 17 and first two paragraphs on page 18 of our slip opinion are amended by striking the portions indicated below, and by adding the language indicated in bold:

Foy also raises a vindictive prosecution claim. **According to Foy, the prosecutor indicted him on first-degree assault in retaliation for Foy's bar complaint against him.** ~~Foy bases this claim on the fact that the prosecutor initially prepared an indictment for the first grand jury hearing charging only third-degree assault for the conduct involving Topkok (which was later withdrawn when Topkok did not appear for the grand jury). But after Foy filed a bar complaint against the prosecutor and asserted his right to a speedy trial, the prosecutor later charged Foy with first-degree assault, in addition to third-degree assault, for the same conduct at the second grand jury hearing. ¶ The State argues that Foy waived this claim by failing to bring a timely motion in the trial court proceedings.³⁸ The State also argues that Foy failed to establish a *prima facie* case of prosecutorial vindictiveness.~~

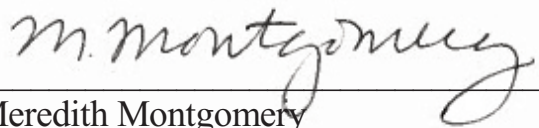
3. In all other respects, the petition for rehearing is DENIED.

Entered at the direction of the Court.

³⁸ The State also argues that Foy failed to establish a *prima facie* case of prosecutorial vindictiveness. The State notes that, prior to the bar complaint being filed, the prosecutor prepared an additional indictment that charged Foy with first-degree assault, and this indictment was read to the first grand jury (although this alternative indictment did not become part of the written record).

Foy v. State, No. A-13019
July 8, 2022 — p. 3

Clerk of the Appellate Courts


Meredith Montgomery

cc: Trial Court Clerk
Publishers (Op No. 2725, 6/10/2022)

Distribution:

Email:
Kentch, Gavin
Burke, Elizabeth Tempel